Kobra Taba Seidali v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–79–03 OF 2012
MOHTARUDIN BAKI, ZAWAWI SALLEH AND HAMID SULTAN JJCA
23 OCTOBER 2013

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Criminal Procedure — Trial — Falilure to call witness — Whether accused denied fair trial — Failure of prosecution to call material witness or to furnish defence with witness' s 112 of the Criminal Procedure Code ('CPC') statement — Whether prosecution failed to rebut defence 'Alcontara Notice' — Whether Radhi's direction breached by trial court failing to sufficiently consider defence's case — Whether integrity of decision making process compromised and incurable under s 60 of the Courts of Judicature Act 1964 — Whether witness' s 112 of the CPC statement inadmissible under s 32(1)(i) of the Evidence Act 1950

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The appellant was in a group comprising of a man ('Jalil'), his wife ('Maryam') and two children who had arrived at the Kuala Lumpur International Airport and were proceeding towards the customs checkpoint with their luggage when narcotics policemen detained them and checked their baggage. Ten shampoo bottles recovered from four bags in the luggage were found to contain methamphetamine. Maryam, whose bag contained four of the bottles, was released together with the two children. She was not charged with any offence. The appellant was charged with trafficking in 1,760g of the drug which was contained in another four of the bottles whilst Jalil was separately charged in connection with the drug contained in the remaining two bottles. The High Court found the appellant guilty of the offence and sentenced her to death. In her instant appeal, the appellant said the trial judge's verdict was perverse in that the prosecution's failure to call Maryam as a witness or to tender her statement under s 112 of the Criminal Procedure Code ('CPC') denied her of a fair trial. She said that failure created a reasonable doubt in the prosecution's case and the trial court should have invoked adverse inference against the prosecution under s 114(g) of the Evidence Act 1950. The appellant also said the trial judge failed to sufficiently consider the defence's case in that although 'Alcontara Notice' had been given, the prosecution failed to rebut the same.

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Held, allowing the appeal:

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(1) The prosecution's failure to produce Maryam as a witness or to hand over a copy of her witness statement to the defence to be used if it was favourable as part of the defence's exhibit at the defence stage was fatal on the factual matrix of the case and denied the appellant of a fair trial. In

addition, the prosecution's failure to rebut the 'Alcontara Notice' or to give appropriate reason for the failure to do so was fatal (see para 19).

(2) The trial judge's failure to consider the defence's case in the right perspective clearly showed *Radhi*'s direction had been breached, compromising the integrity of the decision making process and making the decision unsafe. Such an error on the facts of the case could not be saved by the application of s 60 of the Courts of Judicature Act 1964 (see para 20).

(3) If the witness could not be produced by the prosecution, it was appropriate for the prosecution to hand over the witness's 112 statement to the defence to whittle down any complaint that s 114(g) of the Evidence Act was not invoked (see para 18).

(4) The submission that the prosecution should have admitted Maryam's s 112 statement under s 32(1)(i) of the Evidence Act 1950 had no merit as s 32(1)(i) must be read conjunctively with (j) and was only related to public officers and not to witnesses. Parliament would not have intended that the prosecution could introduce a witness statement as substantive evidence under that subsection without calling the maker of the statement, as that would compromise the integrity of the administration of criminal justice. Considering that subsections (a) to (h) of s 32(1) stood disjunctively, if (i) and (j) were also meant to be read disjunctively, the word 'and' at the end of (i) would not have been inserted (see paras 11, 12 & 17).

[Bahasa Malaysia summary

Perayu terdiri daripada sekumpulan seorang lelaki ('Jalil'), isterinya ('Maryam') dan dua kanak-kanak yang tiba di Lapangan Terbang Antarabangsa Kuala Lumpur dan mereka telah menuju pusat pemeriksaan kastam dengan bagasi mereka apabila polis narkotik menahan dan memeriksa bagasi mereka. Sepuluh botol syampu yang didapati daripada empat beg di dalam bagasi didapati mengandungi methamphetamine. Maryam, yang di dalam begnya mengandungi empat botol, telah dilepaskan bersama-sama dengan kedua-dua kanak-kanak. Dia tidak didakwa atas apa-apa kesalahan. Perayu telah dituduh mengedar 1,760g dadah yang terkandung dalam empat lagi botol manakala Jalil didakwa secara berasingan berkaitan dengan dadah yang terkandung dalam baki dua botol itu. Mahkamah Tinggi mendapati perayu bersalah atas kesalahan itu dan dihukum mati. Dalam rayuannya, perayu berkata keputusan hakim perbicaraan adalah tidak munasabah dalam kegagalan pihak pendakwaan untuk memanggil Maryam sebagai saksi atau memberikan penyataan di bawah s 112 Kanun Tatacara Jenayah ('KTJ') menafikan perayu satu perbicaraan adil. Perayu berkata kegagalan mencipta keraguan munasabah dalam kes pendakwaan dan mahkamah perbicaraan sepatutnya menggunakan inferens angapan bertentangan terhadap pihak pendakwaan di bawah s 114 (g)

Akta Keterangan 1950. Perayu juga berkata hakim perbicaraan gagal membuat pertimbangan secukupnya terhadap kes pembelaan walaupun 'Notis Alcontara' telah diberikan, pihak pendakwaan gagal mematahkan yang sama.

Diputuskan, membenarkan rayuan:

(1) Kegagalan pihak pendakwaan untuk mengemukakan Maryam sebagai saksi atau menyerahkan satu salinan kenyataan saksi perayu untuk pihak pembelaan yang akan digunakan sekiranya menyokong sebagai sebahagian daripada ekshibit pihak pembelaan di peringkat pembelaan adalah fatal pada fakta matriks kes dan menafikan perayu perbicaraan adil. Tambahan lagi, kegagalan pihak pendakwaan untuk menangkis 'Notis Alcontara' atau untuk memberi sebab yang sesuai bagi kegagalan untuk berbuat demikian adalah fatal (lihat perenggan 19).

(2) Kegagalan hakim bicara untuk mempertimbangkan kes pembelaan dalam perspektif yang betul jelas menunjukkan arah *Radhi* itu telah dilanggar, menjejaskan integriti proses membuat keputusan dan pengambilan keputusan yang tidak selamat. Apa-apa kesilapan pada fakta-fakta kes itu tidak dapat diselamatkan oleh pemakaian s 60 Akta Mahkamah Kehakiman 1964 (lihat perenggan 20).

(3) Jika saksi tidak dapat dikemukakan oleh pendakwaan, ia adalah wajar bagi pihak pendakwa menyerahkan saksi kenyataan s 112 kepada pihak pembelaan untuk melemahkan sebarang aduan bahawa s 114 (g) Akta Keterangan itu tidak digunakan (lihat perenggan 18).

(4) Hujahan bahawa pihak pendakwaan perlu menerima pernyataan s 112 Maryam di bawah s 32(1)(i) Akta Keterangan 1950 tidak mempunyai merit memandangkan s 32(1)(i) hendaklah dibaca bersama dengan (j) dan hanya berkaitan dengan pegawai-pegawai awam dan bukannya saksi. Parlimen tidak bertujuan bahawa pihak pendakwaan boleh memperkenalkan pernyataan saksi sebagai bukti substantif di bawah subseksyen itu tanpa memanggil pemberi kenyataan itu, kerana ia akan menjejaskan integriti pentadbiran keadilan jenayah. Memandangkan subseksyen (a) hingga (h) s 32(1) berdiri secara sendiri, jika (i) dan (j) juga bertujuan untuk dibaca berasingan, perkataan 'dan' pada akhir (i) tidak akan dimasukkan (lihat perenggan 11, 12 & 17).]

Notes

For a case on failure to call witness, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5374.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Ang Kian Chai v PP & Another Appeal [2012] 4 MLRA 456 (refd)

A *Cheng Swee Tiang v PP* [1964] 1 MLJ 291 (refd)
Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Munuswamy Sundar Raj v PP [2013] 5 MLJ 48, CA (refd)
B *Natcha Dabkaew v PP* [2013] (K-05-177-07-2012) (unreported) (refd)
Pramod Mandal v State of Bihar [2004] 4 LRI 24 (refd)
PP v A Rashid b Ismail [2001] 1 AMR 1149, HC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
C *PP v Lam Peng Hoa & Anor* [1996] 5 MLJ 405, HC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702, HC (refd)
PP v Sim Kay Chay [2007] 5 MLJ 309, HC (refd)
PP v Thenegaran a/l Murugan [2013] 3 MLJ 328, CA (refd)
D *R v Sang* [1980] AC 402, HL (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
E Criminal Procedure Code s 112
Evidence Act 1950 ss 5, 32, 32(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), 114(g)

Appeal from: Suit No 45A-35 of 2011 (High Court, Shah Alam)

F

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

G **Hamid Sultan JCA:**

[1] The appellant's appeal against conviction and sentence for trafficking of drugs, came up for hearing on 22 August 2013 and on the same day upon
H hearing, the appeal was allowed. My learned brothers Mohtarudin bin Baki JCA and Mohd Zawawi bin Salleh JCA have read the draft judgment and approved the same. This is our judgment.

[2] It is important to note that the appellant and family members arrived at
I KLIA and drugs were seized from their bags. And the appellant's defence was that the drugs belong to another member (Maryam) of the group and the prosecution did not call that person as witness or tender her s 112 of the Criminal Procedure Code ('CPC') statement and in consequence lost the opportunity of a fair trial.

[3] In addition the appellant's allegation is that the learned trial judge had not considered his defence in the right perspective though 'Alcontara Notice' was given and the judgment was perverse when the learned trial judge ruled the defence was an afterthought.

[4] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. (see *Pramod Mandal v State of Bihar* [2004] 4 LRI 24; *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328).

[5] The issues raised in this case is related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

[6] The charge reads as follows:

> Bahawa kamu pada 02 Disember 2010, jam lebih kurang 10.45 malam di kawasan tuntutan bagasi, Aras 3 Ketibaan, KLIA di dalam daerah Sepang di dalam negeri Selangor Darul Ehsan didapati telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1760 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

THE BRIEF FACTS

[7] The learned counsel for the appellant had summarised the facts and it will save much judicial time if it is repeated verbatim. The summary, inter alia, reads as follows:

> The main witness for the prosecution is SP1 (Det Zulkefli bin Zainal). His evidence can be summarized as follows: that on 2 December 2010 at about 10.45pm he was on duty on the 3rd level of the arrival hall near the baggage claim area of the KLIA airport. He was on routine duty together with five other police personnel. At that point of time SP1 noticed a group of five persons comprising of one male adult, two female adults and two children. The three adults were pushing two trolleys with two baggages on each trolley. The group of five were proceeding out of the airport and were near the customs scan machine.
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> SP1 approached them, identified himself and at the same time detained them. He requested the adult male to produce his passport. He was identified as Jalil. SP1 wanted to examine them further and requested SP5 (Abdul Rahman) and Det. Nor Reshiam to escort all five of them to the Narcotics office nearby.

A body search was done on the appellant. Nothing incriminating was found. SP1 then proceeded to search the baggages. He started with the black bag (Apuabm — Ex. P13). P13 had a flight tag registered in the name of Marzivemiss Taba (P13A) bearing No RB069818. Inside P13, amongst the clothings SP1 found four bottles of shampoo bottles (Ex P36A, P36B, P36C and P36D). The clothings in the bag were marked as P13 (1–14).

SP1 found that the contents of these bottles contained liquids. He then tested a bit of the contents of each of the bottle with the aid of a test kit and found that the results were positive indicating the presence of methamphetamine.

Next, SP1 examined the green bag which was plastic wrapped (P14). It carried a flight tag bearing No RB 069819 (P14B). Amongst the clothes (P14C (1–10)) were two shampoo bottles (P35(A) and P35(B)). Similar tests were conducted and they yielded the same results.

SP1 then proceeded to examine a blue Samsonite bag belonging to the Appellant. Nothing incriminating was found. This bag was not produced.

The next bag to be checked was a Reebok bag (P15). It carried a flight tag bearing the Appellant's name (P15A). Amongst the clothings (P15 (1–15)). SP1 found three bottles (P37(A), P37(B) and P37(C)). Similar tests were done and the results were positive indicative of methamphetamine.

The last bag to be searched was the handbag (Nose – P16). Inside P16, SP1 found one bottle (P37D) and the initial test conducted by SP1 again found that it was positive. The other items in the bag were marked as P16 (1–12).

All the exhibits including the bottles were then marked and brought back to the Sepang police station and were handed over to the investigating officer. All 5, including the children, were also brought to the police station. Only the Appellant and Jalil were charged for these offences.

In short, the appellant was charged for trafficking in the four bottles of drugs, of which three bottles were found in the Reebok bag (P15) and one bottle found in the Nose handbag (P16).

In this case, a total of ten (10) bottles were recovered from 4 bags. For the remaining six bottles, four bottles were in the Apuabm bag (P13) belonging to Maryam Niazi Soleiman (Maryam) and two bottles in the green bag (P14) for which Jalil was charged.

Maryam, the wife of Jalil, was not charged but was released together with the two children.

[8] The appellant's petition of appeal, inter alia, reads as follows:

(1) The learned trial judge misdirected herself when she convicted the appellant for the offence of trafficking and sentenced her to death.

(2) The learned trial judge erred when she ruled that the prosecution has proven a prima facie case of trafficking at the end of the prosecution's case.

(3) The learned trial judge erred when she failed to resolve in favour of the appellant aspects of the evidence that speak in favour of the appellant.

(4) The learned trial judge erred when she failed to recognise that the failure of the prosecution to call Maryam Niazi Soleiman (Maryam) or at least tender her 112 statement has compromised the case for prosecution.

(5) The learned trial judge misdirected herself when she relied on 'deemed possession' under section 37(d) and the definition section under section 2 to find that a prima facie case of trafficking has been proven.

(6) The learned trial judge erred when she failed to appreciate the defence case.

(7) The learned trial judge misdirected herself when she failed to hold at the end of the defence case that the failure of the prosecution to call Maryam or to tender her 112 statement has created a reasonable doubt in the prosecution's case.

(8) The learned trial judge erred in that she should have invoked section 114(g) of the Evidence Act against the prosecution at the end of the defence case.

(9) The learned trial judge erred in law when she did not conduct a maximum evaluation on the prosecution's case.

(10) The learned trial judge erred in law when she criticised the appellant for not disclosing to the police that Maryam was the trafficker at the time of her arrest.

(11) The learned trial judge erred in law when she criticised the defence of the appellant as a denial and an afterthought.

(12) The learned trial judge erred in law when she did not adhere to the approach as laid down in *Mat v PP* (1983) MLJ 263.

[9] The learned counsel in the written submission had limited the grounds of appeal to three issues only. It can be summarised as follows: (i) doubts as to exhibits; (ii) failure to produce Maryam or tender her s 112 statement; (iii) failure to appreciate the defence.

EXHIBIT

[10] On the factual matrix of the case we do not find any merits as to the submission in relation to the exhibits, (see *Natcha Dabkaew v Public Prosecutor* [2013] (K-05-177-07-2012)).

SECTION 112 STATEMENT

[11] The learned counsel's submission that the prosecution should have produced s 112 statement of Maryam in reliance of three cases namely: (i) *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649; (ii) *Public Prosecutor v A Rashid b Ismail* [2001] 1 AMR 1149; (iii) *Ang Kian Chai v Public Prosecutor & Another Appeal* [2012] 4 MLRA 456 and have it admitted under s 32(1)(i) of the Evidence Act 1950, have no merit.

[12] It is essential to note that s 32(1)(i) must be read conjunctively with (j) and is only related to public officers and not witnesses. Section 32(1)(i) and (j) was dealt by Hamid Sultan JC (as he then was) in *Public Prosecutor v Sim Kay Chay* [2007] 5 MLJ 309 where he had this to say:

> Whether s 32(1)(i) and (j) must be read conjunctively or disjunctively is a matter of controversy and cases have been decided in both ways (*Public Prosecutor v Michael Anayo Akabogu* [1995] 3 MLJ 42; *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702; *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405). If it is read conjunctively, then the new provision is only limited to the statements made by public officers. On the other hand, if it is read disjunctively, then it relates to a wide variety of statements. Jeffrey Tan JC (as he then was) stated in *Public Prosecutor v Michael Anayo Akabogu* that it is trite that any ambiguity in the language of provisions leading to proof in criminal proceedings, such as s 32(1)(i) and (j), is to be narrowly construed.

[13] Section 32 of the Evidence Act 1950 states:

> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> (a) …
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> to
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> (h) …
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> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and
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> (j) where the statement was made by a public officer in the discharge of his duties.

[14] Section 32 deals with statements of persons who cannot be called as witnesses, on the ground that: (a) they are dead; (b) they cannot be found; (c) they have become incapable of giving evidence; (d) their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable. This section previously contained eight exceptions to the hearsay rule. Under the 1993 Amendment (A851) of the EA 1950 s 32(i) and (j) have been included which are only applicable in criminal proceedings. The statements which are to be admitted should have been made under the particular circumstances stated in section before they are made relevant under s 5 of the EA 1950. Before admitting any piece of evidence on the grounds stated above, the fact must be

proved strictly and the court must be fully satisfied. The provision of s 32(1)(i) and (j) was considered by the court in the case of *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702, where KC Vohrah J (as he then was) observed at p 708:

> In respect of paras (a)-(h), of s 32(1), they are in pari materia with paras (1)-(8) of s 32 of the Indian Evidence Act and the principle for having the original eight exceptions to the hearsay rule is explained in Sarkar on Evidence(1990, Reprint) at p 370, quoting from Wigmore (ss 1420–1422):
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> The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.
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> To be noted too, is that the principle of impeaching and discrediting or corroborating the declarant of a dying declaration is recognised by a statutory provision and in fact extends to all declarants of statements made admissible under ss 32 and 33 of the Evidence Act 1950 as s 158 of the Evidence Act 1950 provides that 'whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested'. In my view, the weight and degree of credit to be attached to a statement by a declarant under para (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a 'jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge'.

[15] In *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405, Kang Hwee Gee J was of the view that ss 32(1)(i) and (j) of the EA 1950 should be read disjunctively and said that the word 'and' which joins sub-s (i) and (j) could admit of no more significance than an exposition of the draftsman's preference of a conjunction as an ending to all the provisions in sub-s (1) of

s 32. Further, the learned judge said that it is clear that the language used in s 32(1)(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation.

[16] It is elementary principle of common law that hearsay evidence which is incapable of being tested by cross-examination to determine its veracity is not admissible to determine the guilt. And if it is so made admissible it may be for the limited purpose to corroborate some material evidence. Anything less will be abhorrent to notion of justice and fair play (see *Article* [2000] 4 MLJ lxv). *The position is the same in all civil society* (Emphasis added.)

[17] Section 32 of EA 1950 to some extent permits hearsay evidence to be admissible in civil and criminal cases. The section actually deals with common law exception to the hearsay rule until the introduction of s 32(1)(i) and (j) attempting to introduce a new inroad to the hearsay exception. If the exception is limited to public officers when read conjunctively there is very little the defence can complain of unless the statement is used to establish a substantive element of the offence, as compared to the nexus to the charge. However, when it relates to witness statement and is introduced by the prosecution as substantive evidence without calling the maker the integrity of administration of criminal justice will be compromised. Parliament as well as Parliamentary draftsman will have never intended such an approach and if it is so they would ought to have rightly stated so without using the word 'and' which is often used to connect the sentence taking into consideration (a) to (h) which stands disjunctively, and if (i) and (j) is meant to be disjunctive 'and' need not be used at all. Cases such as *Lam Peng Hoa* only considered (i) and (j) and failed to consider s 32 as a whole as well as the underlining jurisprudence relating to hearsay rule and liberty of the subject and the constitutional guarantees to achieve fair trial by means of procedural law (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301). Even if it is to be read disjunctively the court has the discretion to exclude prejudicial evidence or give low probative value (see *R v Sang* [1980] AC 402; *Cheng Swee Tiang v Public Prosecutor* [1964] 1 MLJ 291). If low probative value is given to that piece of evidence then it becomes a worthless piece of evidence independently when applying the maximum evaluation and beyond reasonable test. When it is not used as a substantive evidence but only for purpose of corroboration it may carry some probative value to show nexus.

[18] Having said that, if the witness cannot be produced by the prosecution it will be appropriate for the prosecution to hand over the s 112 statement recorded from the witness to whittle down any complaint by the defence to invoke s 114(g) of EA 1950 as in the instant case.

[19] In the instant case, we take the view the failure of the prosecution to

produce Maryam as a witness or hand over a copy of the witness statement to the defence to be used if it is favourable as part of the defence exhibit at the defence stage is fatal on the factual matrix of the case. In addition the failure of the prosecution to rebut the 'Alcontara Notice' or give appropriate reason to do so is also fatal. (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705; *Munuswamy Sundar Raj v Public Prosecutor* [2013] 5 MLJ 48). In consequence we agree with the learned counsel that an opportunity of fair trial has been compromised by the prosecution.

[20] The failure of the learned trial judge to consider the defence case in the right perspective clearly shows that *Radhi*'s direction has been breached compromising the integrity of the decision making process thereby making the decision unsafe and such an error on the facts of the case cannot be saved by the application of s 60 of the Courts of Judicature Act 1964. (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[21] For reasons stated above it is our considered view that it is not safe to convict. In consequence the appeal is allowed. The conviction and sentence of the High Court is squashed.

We hereby order so.

Appeal allowed.

Reported by Ashok Kumar